

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS EDWARD NEDROW, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C16-5448BHS
CR12-5137BHS

ORDER GRANTING PETITION,
GRANTING DEFENDANT'S
MOTION FOR LEAVE TO FILE
EXCESS PAGES, AND DENYING
DEFENDANT'S MOTION TO
STAY

This matter comes before the Court on Plaintiff Thomas Edward Nedrow, Jr.'s ("Nedrow") motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (Dkt. 1), Defendant United States of America's ("Government") motion for leave to file excess pages (Dkt. 5), and the Government's motion to stay (Dkt. 6). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On March 27, 2012, Nedrow pled guilty to one count of possession of a stolen firearm in violation of 18 U.S.C. § 922(j). CR12-5137BHS, Dkt. 20. As part of the plea

1 agreement, Nedrow conceded that he had two prior felonies, which were second-degree
2 assault and rioting while armed with a deadly weapon. *Id.* Nedrow's base offense level
3 was 24 under the sentencing guidelines because he committed the offense subsequent to
4 sustaining at least two felony crimes of violence. U.S.S.G. § 2K2.1(a)(2). The notes for
5 this section of the guidelines provide that the phrase "crime of violence" has the meaning
6 as set forth in U.S.S.G. § 4B1.2(a), which contains a residual clause. On July 23, 2012,
7 the Court sentenced Nedrow to 92 months imprisonment. *Id.*, Dkt. 30.

8 On June 7, 2016, Nedrow filed the instant motion seeking relief under *Johnson v.*
9 *United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257
10 (2016). Dkt. 1. On September 16, 2016, the Government responded, Dkt. 4, and filed a
11 motion for leave to file excess pages, Dkt. 5.¹ On October 19, 2016, Nedrow replied.
12 Dkt. 8.

13 On September 22, 2016, the Government filed a motion to stay pending the
14 Supreme Court's decision in *Beckles v. United States*, No. 15-8544. Dkt. 6. On
15 September 26, 2016, Nedrow responded. Dkt. 7.

16 II. DISCUSSION

17 As a threshold matter, the majority of the issues presented in this case have been
18 addressed by courts in this district and across the nation. The Court declines to reinvent
19 the wheel and, instead, will simply adopt opinions that it finds persuasive on the
20 particular issue addressed.

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22 ¹ The Court grants the Government's motion for leave to file excess pages and will accept
both parties' overlength briefs.

1 **A. Motion to Stay**

2 The Government requests that the Court stay this matter pending the Supreme
3 Court's expected decision in *Beckles*. Dkt. 6. The Court denies the Government's
4 motion because "this [is] a habeas case challenging an unconstitutional confinement,
5 [and] it is also unclear when or if the Supreme Court will decide *Beckles*." *Knox v.*
6 *United States*, No. C16-5502BHS, 2016 WL 3906915, at *2 (W.D. Wash. July 19, 2016).

7 **B. § 2255**

8 First, the Government argues that Nedrow waived any right to appeal his sentence.
9 Dkt. 4 at 8–9. The Court disagrees because Nedrow's sentence violates the law. *United*
10 *States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007); *Gilbert v. United States*, Case No. 15-
11 cv-1855-JCC, 2016 WL 3443898, at *2 (W.D. Wash. June 23, 2016); *Dietrick v. United*
12 *States*, No. C16-705 MJP, 2016 WL 4399589, at *2 (W.D. Wash. Aug. 18, 2016).

13 Second, the Government argues that Nedrow's petition is procedurally barred.
14 Dkt. 4 at 9–14. The Court disagrees, adopts the reasoning of courts in this district, and
15 finds that Nedrow's *Johnson* claim is not procedurally defaulted because he has
16 demonstrated cause and prejudice. *See Gilbert*, 2016 WL 3443898, at *2–3 (finding the
17 cause requirement satisfied in this context because *Johnson* explicitly overruled the
18 holdings in *Sykes v. United States*, 564 U.S. 1 (2011), and *James v. United States*, 550
19 U.S. 192 (2007), that the ACCA residual clause was constitutional); *Dietrick*, 2016 WL
20 4399589, at *3 (same).

21 Third, the Government argues that *Johnson* does not apply to the sentencing
22 guidelines. Dkt. 4 at 14–23. The Court disagrees, adopts the reasoning of courts in this

1 district, and concludes that *Johnson* is retroactively applicable in this context. *See*
2 *Gilbert*, 2016 WL 3443898, at *3–6; *Dietrick*, 2016 WL 4399589 at *3 (same); *see also*
3 *Welch*, 136 S. Ct. 1257; *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189 (9th Cir.
4 2011).

5 Fourth, the Government argues that Nedrow bears the burden of showing that the
6 Court necessarily relied upon the residual clause when it found that his prior offenses
7 were predicate offenses. Dkt. 4 at 23–24. The Court disagrees, adopts the reasoning of
8 courts in this district, and concludes that Nedrow may challenge whether either of the
9 underlying predicate offenses qualified under the residual clause of the sentencing
10 guidelines. *Dietrick*, 2016 WL 4399589 at *3; *Gibson v. United States*, No. C15-5737
11 BHS, 2016 WL 3349350, at *1 (W.D. Wash. June 15, 2016).

12 Finally, the Government argues that Nedrow’s second-degree assault conviction is
13 a crime of violence, but concedes that Nedrow’s rioting conviction is no longer a
14 predicate crime of violence. Dkt. 4 at 24–26. The Government’s concession on the latter
15 issue is sufficient cause to grant Nedrow’s petition, and the Court will address the
16 Government and Nedrow’s arguments regarding the assault conviction at the
17 resentencing hearing.

18 **III. ORDER**

19 Therefore, it is hereby **ORDERED** that Nedrow’s motion to vacate, set aside or
20 correct sentence pursuant to 28 U.S.C. § 2255 (Dkt. 1) is **GRANTED**, the Government’s
21 motion to stay (Dkt. 6) is **DENIED**, and the Government’s motion for leave to file excess
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1 pages (Dkt. 5) is **GRANTED**. The parties shall work with the Clerk to schedule an
2 expeditious resentencing in the criminal case. The Clerk shall close this case.

3 Dated this 26th day of October, 2016.

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6 BENJAMIN H. SETTLE
7 United States District Judge
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